Supreme Court, U.S.
FILED

961983 MAR 17 1997

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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER 1996 TERM

KEITH O. COBB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari From The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KEITH O. COBB, Petitioner
Federal Correctional Institution
#60806-080
5050 E. Whatley Road
P. O. Box 5050
Oakdale, LA. 71463

61 pp

QUESTIONS PRESENTED

1. Does a federal court deny a criminal defendant his constitutional right to due process where it permits a conspiracy conviction to stand where the only testimony of conspiracy is from the uncorroborated statements of convicted felons about what they, respectively, were told by another?

2. Does a federal court deprive a criminal defendant of his constitutional right to due process when it imposes a sentence which reflects enormous enhancement based on drug quantities reported only at sentencing by a law enforcement officer, as reported to him by a confidential informant?

3. Is a federal sentencing court required to base its sentence on "clear and convincing" evidence when the sentence is enormously enhanced by testimony presented solely at the sentencing hearing, and, if so, does not the testimony given in the instant case constitute something much less than such "clear and convincing" evidence?

4. Was the Court of Appeals' decision to uphold the money laundering conviction, despite a finding that "...the government did not show that the money came from drug trafficking" an affirmance which so departed from the accepted and usual course of judicial proceedings that this Court should reverse the decision of the Court of Appeals?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Petitioner certifies that the following persons comprise all parties to the proceeding in the court whose judgment is sought to be reviewed.

1. Anthony Lamone Misher
2. Keith O. Cobb
3. Ricky E. Levi
4. Rodney E. Heslip

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II. Does a federal court deprive a criminal defendant of his constitutional right to due process when it imposes a sentence which reflects enormous enhancement based on drug quantities reported only at sentencing by a law enforcement office, as reported to him by a confidential informant?

III. Is a federal sentencing court required to base its sentence on "clear and convincing" evidence when the sentence is enormously enhanced by testimony presented solely at the sentencing hearing, and, if so, does not the testimony given in the instant case constitute something much less that such "clear and convincing" evidence?

IV. Was the Court of Appeal's decision to uphold the money laundering conviction, despite a finding that "...the government did not show that the money came from drug trafficking" an affirmance which so departed

from the accepted and usual course of judicial proceedings that this Court should reverse the decision of the Court of Appeals?

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PRAYER

The petitioner, Keith O. Cobb, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued October 30, 1996, for which rehearing was denied on December 16, 1996.

OPINION BELOW

On October 30, 1996, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Cobb, _____. A copy of that opinion is attached as Appendix A.

A copy of the judgment and sentence of the district court is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

On October 30, 1996, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. A petition for rehearing was filed by Petitioner ANTHONY MISHER, which petition was denied on December 16, 1996. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law...

U.S. Const. Amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.....

U.S. Const. Amend. VI.

Rule 103 of the Federal Rules of Evidence provides, in pertinent part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context....

Fed. R. Evid. 103(a)(1).

Rule 802 of the Federal Rules of Evidence provides:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. R. Evid. 802.

STATEMENT OF THE CASE

Course of Proceedings

This is the petition for review from an affirmance of a conviction and sentence out of the Western District of Texas, Waco Division, over which United States District Judge Walter Smith presided. Petitioner was found guilty of one count of conspiracy to possess with the intent to distribute cocaine, and one count of conspiracy to commit money laundering, and was sentenced to four hundred months as to Count One and sixty months as to Count Two, such terms to be served concurrently. Petitioner challenges both the conviction and sentence, both of which were affirmed by the Court of Appeals for the Fifth Circuit.

Petitioner was one of six defendants charged in a three-count indictment filed on December 14, 1993. The case was tried under a Second Superseding Indictment filed on January 11, 1994, which added a fourth count and a seventh

defendant, whose case was apparently severed. Beginning on December 14, 1994, Petitioner and three co-defendants were tried before a jury, and Petitioner was found guilty of Counts One and Two on December 22, 1994. On April 7, 1995 Petitioner was sentenced to incarceration for a period of four hundred months as to Count One, and sixty months for Count Two, to be served concurrently, and a fine of $10,000.

STATEMENT OF FACTS

The facts of this case are most unusual in several respects. Although the indictments arose from an investigation which had been on-going for at least ten months prior to the execution of search warrants, although it involved no fewer than five separate law enforcement agencies, no evidence of undercover transactions was introduced. No drugs were introduced. There were no tape-recorded conversations, and no single specific event which triggered an arrest or search warrant.

On April 21, 1993, at least nine months after the investigation was begun, seven search warrants were issued and executed on seven residences where the defendants respectively lived or were know to frequent. No drugs were found in these searches. Little was found in the way of weapons or ammunition. Nine months later, the first indictment in this case was filed.

The Government's evidence at trail can be broken into two parts: first, evidence designed to demonstrate a high life-style and no means of support or employment; and, second, testimony from convicted felons already serving sentences for drug convictions. The only drug testimony was presented through these prisoners.

It was through the Government's witnesses that evidence was introduced that Petitioner was a heavy and successful gambler (TR. 1490-91; 1527, 1554, 1586), and that he operated a nightclub and promoted concerts for 'Rap' groups, from which $20,000 was earned for one such concert

alone (TR. 1100-1106; 1253-1270). Additionally, Petitioner's former counsel testified that Petitioner had received $27,000 from a worker's compensation case (TR. 1156-1162). This testimony certainly provided reasonable doubt that Petitioner's life style, which was not extravagant, had to have been the fruits of illegal drug activity.

The remainder of the Government's case, as referenced above, came from the testimony of seven federal prison inmates, who were each seeking to have their sentences reduced. The most damaging of these witnesses, Luis Sais, had been in prison for fourteen months prior to the issuance of the search warrant (TR. 739). At the time he first began his discussions with federal agents about Petitioner, he had already testified against his co-defendants in his case, and had received the benefit of a downward departure motion filed by the Government for this testimony, which resulted in a twelve-year reduction in his sentence (TR. 707). It was not disputed that he anticipated the filing of a Rule 35 motion to

reduce sentence to be filed by the Government in exchange for the testimony given in the instant action.

The testimony of each of the prison witnesses is self-contradictory, general and vague with regard to the transactions, particularly the quantity amounts and the dates, and suspicious on its face because of the expectations of benefit to be derived from the testimony.

There was no corroboration of events among the witnesses; that is, no two witnesses testified about a single transaction. Petitioner submits that, taken as a whole, the testimony lacks the credibility required for a conviction.

ISSUE NO. 1

Does a federal court deny a criminal defendant his constitutional right to due process where it permits a conspiracy conviction to stand where the only testimony of conspiracy is from the uncorroborated statements of convicted felons about when they, respectively, were told by another?

The testimony of these witnesses, even if taken as true, did not establish a conspiracy. Each transaction

addressed criminal conduct against only one of the co-defendants. In a few instances, the witnesses testified that another of the co-defendants was present. There was no testimony that any witness had personal knowledge of an agreement among the co-defendants, or personal knowledge of facts from which an agreement could even be inferred. The strongest evidence presented in this regard was in the nature of "X told me he got his drugs from y" where x and y are both co-defendants. Such testimony can be found in the record, but not often, and Petitioner submits that even if such testimony is admissible hearsay where a conspiracy is later proved, no conspiracy was ever proved, and these statements, standing alone, cannot establish a conspiracy.

The crime of conspiracy focuses on agreements, not groups. To join a conspiracy, a defendant must intend to join a specific agreement to commit a specific crime, in this case, the possession and distribution of cocaine. To sustain a conspiracy conviction, there must be more than suspicion,

more than knowledge, acquiescence, carelessness, indifference or lack of concern. *Direct Sales Co. v. United States,* 319 U.S. 703, 713 (1943). In order to be a member of a conspiracy, there must be evidence that the accused intended to bring about the objects of the conspiracy. The Supreme Court observed that "...charges of conspiracy are not to be made out by piling inference upon inference." *Ingrem v. United States,* 360 U.S. 672, 680 (1959). While the use of circumstantial evidence in proving the existence of a conspiratorial agreement is valid, the court has repeatedly stressed that it will not lightly infer a defendant's knowledge of and participation in a conspiracy. *United States v. Maltoes,* 985 F.2d 1139, 1157 (5th Cir. 1993). Placing a defendant in a "climate of activity that reeks of something foul" is not enough to support a conspiracy conviction. *United States v. Dean,* 59 F.3d 1479, 1490 (5th Cir. 1995).

The reviewing courts look at the totality of the relationship of alleged conspirators and affirmative links

between alleged conspirators before they will infer an agreement from circumstantial evidence. "..[M]ere presence and association alone cannot support a conspiracy conviction." *Id.* at 1492.

More than evidence of drug transactions between individuals is needed in a drug distribution case to uphold a conspiracy theory. *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991). *cert. denied*, 115 S.Ct. 773 (1995). The *Townsend* case is analogous to the case at bar. In *Townsend*, nineteen defendants were charged in a conspiracy to possess and distribute heroin, cocaine, and marijuana. The indictment resulted from the investigation of one principal target. All individuals that negotiated drug deals with this target were indicted as part of the conspiracy. The government reasoned that by dealing with this individual, who was known by each defendant as a large-scale drug dealer, each defendant supported and conspired with him and the others with whom he dealt. The court held that "evidence of a buyer-seller

relationship, standing alone, is insufficient to support a conspiracy conviction." *Id.*, at 1394. The Court found that in a buyer-seller relationship, the buyer's purpose is to buy and the seller's purpose is to sell and there is no joint objective. In reviewing the sufficiency of the evidence for each defendant, the court looked at each defendant's stake in the success of the major dealer's activities, the degree of cooperation, and the frequency of the transactions. *Id.* at 1406. In summary, the court examined more than the benefit derived by each party in the transaction, and examined each party's relationship to benefits enjoyed by the group.

A. Testimony of Gerald Hicks. Gerald Hicks was a co-defendant who pled guilty to the money-laundering count two weeks before trial. He testified to participation in drug transactions with Ricky Levi, and testified that he did not know of Levi's associations with others in the drug trade (TR. 334). Further, he testified that he never purchased cocaine from Petitioner (TR. 342), and that he never discussed with

Petitioner the drug transactions he conducted with Levi (TR. 342). The most incriminating testimony from Hicks was that Petitioner showed him how to "rock up" cocaine using a microwave (TR. 369).

In exchange for his testimony, the Government dismissed charges against Hicks relating to the cocaine conspiracy (TR. 391). As part of his plea bargain agreement, the U.S. Attorney's Office reserved the right to decide whether Hicks was telling the truth at the trial, and retained the right to rescind the plea bargain agreement if decided that he was not (TR. 480-481).

B. Testimony of Clemond Busby. Clemond Busby had entered into a plea agreement approximately two weeks before the trial, pleading guilty to Count Four of the Second Superseding Indictment, which was a firearms charge. The Government dismissed the cocaine conspiracy charge against Busby in exchange for his testimony (TR. 544). Busby testified that he bought cocaine from Petitioner from

December 1992 to February 1993 (TR. 550, 561). He purchased three ounces of powder cocaine from Petitioner in this first transaction (TR. 521). Ricky Levi was present for this transaction and Busby gave Levi the money for the drugs (TR. 584). About three weeks later he bought another two and one-half ounces from Petitioner(TR. 527). Misher was present and drove the car that Petitioner arrived in for this transaction (TR. 528). Misher did not participate in the transaction other than as the driver of the car (TR. 529). He further testified that on three or four occasions he purchased between one-fourth ounce and one-half ounce from Petitioner (TR. 533).

C. Testimony of Sedric Thompson. Sedric Thompson testified that he conducted one drug transaction with Co-Defendant Misher, and Petitioner was present (TR. 654). He purchased one-half ounce of powder cocaine for $500. (TR. 655).

D. Testimony of Luis Sais. Luis Sais was sentenced in July 1993 after pleading guilty to a charge of conspiracy to distribute cocaine in a separate case (TR. 705). The Government filed a motion for a downward departure of his sentence in exchange for his testimony (TR. 706). Sais testified that he first purchased cocaine from Petitioner in September or October 1991, a one-ounce quantity (TR. 712). Sais testified that Petitioner arrived in his Mustang (TR. 747), even though sales documents introduced as exhibits and trial testimony demonstrate that Petitioner did not own the Mustang at this time (TR. 1208). He initially stated that the purchase price for this cocaine was between $550 and $650 (TR. 716). Later he testified that he paid $700 (TR. 748).

Sais testified that he purchased between one and five ounces of cocaine from Petitioner every one or two weeks after that first transaction (TR. 717), for a total of ten to fifteen times (TR. 745), but was only able to specifically remember a total of six transactions. There was a five-ounce

purchase which occurred at a restaurant (TR. 752), and a two-ounce transaction which occurred at a Dairy Queen (TR. 754). In December 1991, he purchased two ounces of "crack" cocaine from Petitioner (TR. 718). There was a one-ounce sale for which Ricky Levi was present (TR. 765).

Sais testified that Levi was present during one of these transactions, and Misher was present during another (TR. 721, 723). Sais testified that he sold between five and ten ounces of cocaine per week between September 1991 and February 1992 (TR. 741-742). This amount fluctuated, and there were times when he did not sell any cocaine for an entire week (TR. 742). He testified that Petitioner was not his only supplier (TR. 739). He contemporaneously purchased cocaine from Bryon McCutcheon (TR. 739), approximately two or three times per month (TR. 740), and Keith Dancer (TR. 743-44).

His association with Petitioner ended in February 1992, when he was incarcerated (TR. 719 Sais received a

sentence of ninety-six months, which sentence was pronounced one year after he pled guilty, and after his testimony in three other drug trials (TR. 706, 757). Under the sentencing guidelines, his original sentence range was life imprisonment (TR. 706). His sentence was reduced by one hundred forty-two months was "knocked off" his sentence because of his cooperation with the Government (TR. 707). Sais did not begin providing the Government agents information about the defendants in the instant action until after he was sentenced (TR. 759), and it is his hope that this testimony results in the Government's filing of a Rule 35 Motion to reduce his sentence (TR. 760).

E. Testimony of Kenneth Cross. Cross has pled guilty to federal cocaine conspiracy charges in another case, and was awaiting sentencing at the time of his testimony. The Government had advised him that he would receive a downward departure of his sentence in exchange for his testimony (TR. 790).

He testified that on one occasion in 1991 or 1992 he sold Petitioner eighteen ounces of cocaine (TR. 794). Misher was present for this transaction (TR. 796). This is the only testimony of a purchase by Petitioner, and, under a separate issue, Petitioner submits that this amount should not have been included with 'sales', to determine total amounts for which he was to be held accountable.

F. Testimony of Vincent Keith Walton. Walton was convicted of an unrelated federal cocaine conspiracy in November 1991 (TR. 845). His testimony was proffered in anticipation of the Government's agreement to file a Rule 35 motion to reduce his present sentence of eighty months (TR. 846), which sentence already represents a forty-one month downward departure from the lower end of his sentencing range (TR. 859).

He testified that in June or July 1991, he another each purchased one ounce of powder cocaine from Ricky Levi. He provided inconsistent testimony as to whether

Petitioner was driving the vehicle (TR. 853, 877). He further testified that he didn't know whether Petitioner was aware of the transaction (TR. 869). Walton admitted during cross-examination that in the Marvin Webster trial, he testified that Webster was his only supplier of cocaine (TR. 878).

G. Testimony of Steven Geron Gaines. Gaines is serving a term of 110 months for federal convictions of conspiracy to distribute cocaine and possession with the intent to distribute cocaine. He is hopeful that the Government will file a Rule 35 sentence reduction motion based upon his testimony in this trial (TR. 894). Gaines testified that in 1987 he purchased 2/16 ounce of "rocked up" cocaine from Petitioner (TR. 898). In October 1991, he purchased two one-half ounce amounts from Petitioner (TR. 899), but testified to one-half this amount during cross-examination (TR. 937-938). In 1992, he purchased cocaine from Petitioner between ten and twenty times (TR. 900). Keith

Dancer was Gaines' major source for cocaine, not Petitioner (TR. 903).

In the case at bar, the Government did not present sufficient evidence to show that Petitioner intentionally joined a conspiracy with Ricky Levi, Anthony Misher, and Rodney Heslip, the specific objective of which was the possession and distribution of cocaine. Petitioner was associated with one co-defendant, Rodney Heslip, because he was his half-brother. He was friends with another co-defendant, Ricky Levi. Even if the evidence were sufficient to establish that Petitioner sold cocaine, there is nothing to indicate that he conspired with another co-defendant to distribute cocaine.

The Government offered no proof that any co-defendant benefited from drug transactions ascribed to Petitioner. Nor did the Government offer any proof that the other conspirators had any knowledge of Petitioner's dealings, or any role in planning or carrying out the transactions.

The evidence may be sufficient to show that Petitioner distributed cocaine as a lone drug dealer, but the evidence does not indicate that Petitioner and any of the co-conspirators entered into an agreement to possess and distribute cocaine. Further, the evidence does not indicate even sporadic drug transactions with any of the other co-conspirators.

No evidence indicates that Petitioner and any of the co-defendants ever negotiated for drugs together. No evidence indicates that Petitioner was present with any of the co-defendants when drug negotiations took place. No evidence indicates that Petitioner was supplied by any of the other co-conspirators, or that he reported to any of them. No evidence indicates that Petitioner used any of the co-defendants' homes to distribute cocaine, or that Petitioner supplied any of the co-defendants with drugs.

The Government's case merely placed Petitioner in a climate of activity that reeks of something foul. If this were

a case wherein Petitioner was charged with the distribution of cocaine, the Government's case may be sufficient. However, Petitioner was charged with a conspiracy and the Government used an amalgam of inferences to construct a theory of conspiracy among these defendants. The evidence presented at trial is insufficient to prove that Petitioner had an agreement to possess and distribute cocaine with any of the co-defendants.

ISSUE NO. 2.

Does a federal court deprive a criminal defendant of his constitutional right to due process when it imposes a sentence which reflects enormous enhancement based on drug quantities reported only at sentencing by a law enforcement officer, as reported to him by a confidential informant?

DISCUSSED WITH

ISSUE NO. 3

Is a federal sentencing court required to base its sentence on "clear and convincing" evidence when the sentence is enormously enhanced by testimony presented solely at the sentencing hearing, and, if so, does not the testimony given in the instant case constitute something much less than such "clear and convincing" evidence?

Petitioner suffered enormous enhancement of his sentence based on the testimony of Case Agent Darryl Moore at the sentencing hearing that a confidential informant had advised him that he "observed Mr. Cobb in possession of a kilo on at least 15 to 20 occasions from the –May of 1986 up until Mr. Torres was arrested, which was on 4-13 of '89." (Sentencing Hearing, page 12, 13), and, further, that this confidential informant had advised him that after the date of that arrest and before July 1992, he had personally observed Petitioner with ten kilograms of cocaine (Sentencing Hearing, page 13).

The amounts obtained from the testimony at trial of the six prisoner witnesses regarding purchases from Petitioner totalled 1.630 kilograms of powder cocaine and 60.24 grams of "crack" cocaine. After application of the equivalency tables, these amounts total the equivalent of 7.63 kilograms of cocaine, which carries a base offense level of 32 (Sentencing Guidelines, Section 2D1.1(c) (4). Petitioner's

guideline range, based on the trial testimony, including a 4-level role adjustment and applied to a Criminal History Category II, yields a sentence range of 210-262 months. The maximum end of this range is 138 months less that the sentence which Petitioner received.

The PSR submitted in this case is written in a confusing manner and the totals are added incorrectly. Appendix C to this petition is a copy of a letter sent from by the Government's counsel to the Justices for the Fifth Circuit, which identifies that the PSR recommended that Petitioner be held accountable for a total of 25.81 kilograms of powder cocaine and 1.325 kilograms of "crack" cocaine. It further states, "At sentencing, the district court reduced this amount by 680.4 grams of powder cocaine and 453.6 grams of crack cocaine to eliminate any risk of double counting." (third paragraph). In fact, the reason for this reduction was because these amounts also represented transactions only provided at sentencing, reported by Agent Moore to have been received

from one Bobby Brown, a person whom he confessed he did not know (Sentencing Hearing, page 49), and a person with whom he had first spoken only one hour before the sentencing hearing (Sentencing Hearing, page 49).

What this means is that Petitioner was sentenced based on accountability amounts of 25.1296 kilograms of powder cocaine, 25 kilograms of which is solely obtained from Agent Moore's testimony regarding what this confidential informant told him, and .8714 kilograms of "crack" cocaine, of which, 18 ounces, or .5103 kilograms was the quantity which was the subject of the letter (Appendix C). Petitioner argued in his appellate brief that this amount should not have been counted as "crack" cocaine, because the only person to testify about the transaction, Kenneth Cross, testified that he sold Petitioner powder cocaine. Additionally, Petitioner argued that this was the only testimony regarding a purchase by Petitioner, and the testimony was that the purchaser occurred in 1991 or 1992. Because there is no

testimony which addresses sales transactions by Petitioner which pre-date this transaction, to include this purchase as well as the later sales constitutes double-counting.

The enormity of the harm imposed upon Petitioner from the agent's sentencing testimony is clear when one observes that the 25 kilogram hearsay testimony, taken by itself, immediately places Petitioner at a Level 34. All of the other testimony together, including the double-counting of the Cross testimony, only edged the level up to 36.

ISSUE NO. 4:

Was the Court of Appeals' decision to uphold the money laundering conviction, despite a finding that "...the government did not show that the money came from drug trafficking" an affirmance which so departed from the accepted and usual course of judicial proceedings that this Court should reverse the decision of the Court of Appeals?

The trial indictment specifically charged in Count Two that Appellant had conspired to use a portion of the proceeds of drug trafficking to purchase a 1984 Jaguar from GEM Cars, Inc. for $14,500 on March 28, 1989. The specific

charge against him was conspiracy to violate Section 1956(a)(1)(B)(i).

Section 1956 (a)(1)(B)(i) reads as follows:

> **18 U.S.C. 1956. Laundering of monetary instruments**
>
> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity,
>
> ...shall be sentenced to a fine of not more than $500,000, or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

The Government presented the testimony of Mark McCurry, who testified that his dealership sold a Jaguar to a woman accompanied by a man named Keith. The man paid for the car with cash. He did not identify Petitioner as the man who paid the money (TR 1193). The Government also presented witnesses who testified that they had made repairs on the car. But what does <u>not</u> appear in the record is <u>any</u> testimony regarding the illicit genesis of the purchase money.

No witness presented testimony regarding drug transactions with Appellant in 1988 or 1989. The Court of Appeals recognized in its opinion that the Government did not prove that the money for the purchase came from drug trafficking. Accordingly, it was reversible error for the Appellate court to permit this conviction to stand.

CONCLUSION

For these reasons, the petitioner, KEITH O. COBB, respectfully prays that his application for Writ of Certiorari be granted by this Court, or, in the alternative, that this Court enter a GVR order to guarantee him full and fair consideration of his rights.

Respectfully submitted,

Keith Cobb by Constance Se

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Date: June 13, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-50248

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ANTHONY LAMONE MISHER, RICKY E. LEVI,
RODNEY EARL HELSIP, AND KEITH O. COBB,
Defendants - Appellants.

Appeals from the United States District Court
for the Western District of Texas

Before REYNALDO G. GARZA, JOLLY, and DEMOSS, circuit Judges.

This appeal arises from a drug conspiracy which operated in Waco, Texas, from 1989 to 1993. All the appellants were convicted and sentenced on indictments arising from this conspiracy. More specifically, all the appellants were convicted for conspiring to possess and distribute cocaine in and about the Waco area. Additionally, appellants Cobb and Levi were also convicted for conspiring to launder money from the proceeds they received out of the drug conspiracy. All the appellants challenge both their convictions and their sentences.

APPENDIX A

I. Facts and Summary of Proceedings

In January 1994, a federal grand jury, sitting in the Waco Division of the Western District of Texas, filed the second superseding indictment ("the indictment") involved in the instant case. Count one of the indictment charged Appellants Anthony Lamone Misher, Rickey E. Levi, Rodney Earl Heslip, and Keith O. Cobb, as well as Clemond E. Busby, and Gerald D. Hicks, Jr.[1] And others known and unknown to the Grand Jury, with conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and actually distributing it, in violation of 21 U.S.C. 841(a)(1). Count two charged Appellant Cobb and Natalie Annique Bradshaw[2] with conspiring to launder money by using funds they knew to be the proceeds of illicit drug trafficking to purchase a 1984 Jaguar in such a way as to disguise the nature, location, source, ownership, and control of the drug proceeds, in violation of 18 U.S.C. 1956 (a)(1)(B)(i). In Count Three of the indictment, the grand jury charged

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[1] Neither Busby nor Hicks is a party to this appeal. Hicks pled guilty to Count Three of the indictment and Busby pled guilty to County Four. They testified for the government at trial.

[2] Bradshaw is not a party to this appeal.

Appellant Levi and Gerald D. Hicks, Jr.,[3] with laundering money in the same fashion as Appellant Cobb had been charged in Count Two. A jury convicted all the appellants as charged in their indictments.

The district court sentenced Misher to serve 360 months in prison and four years of supervised release. It also ordered him to pay a $50 special assessment and a $3,000 fine.

The district court sentence Levi to serve 300 months in prison and five years on supervised release on Count One of the indictment; he was sentenced to 240 months in prison and three years of supervised release on Count Three. The court ordered the sentences on Count Three to be served concurrent to those on Count One. It also imposed a $100 special assessment and a $3,000 fine.

Heslip was ordered to served a 120-month imprisonment term followed by five years of supervised release for his conviction on Count One of the indictment. The court imposed a $50 special assessment and a $2,000 fine, as well.

Cobb was sentenced to 400 months in prison and five years os supervised release on Count One; he was ordered to

---

[3] See note 1, surpa.

serve 360 months in prison and three years of supervised release on Count Two. The court ordered the terms to be served concurrent to each other. It also ordered Cobb to pay a $100 special assessment and a $10,000 fine.

Cobb was the hub of the drug conspiracy which included all of the appellants. He established his drug trade in Waco and competed for business with another drug dealer by the name of Keith Dancer. Cobb and Dancer were the "two top-notch drug dealers" in Waco.

Misher sold cocaine for Cobb and was present three or four times when Cobb sold cocaine to others. In fact, Misher and Cobb sold cocaine as a team. At one point in time, Cobb gave Misher a Cadillac.

Levi and Cobb also dealt cocaine together. Cobb sold cocaine in the presence of Levi; Levi received cocaine from Cobb; Cobb taught a witness how to manufacture crack cocaine in Levi's kitchen; Levi went to far as to tell a witness that he and Cobb had a bunch of crack houses in Waco.

Heslip sold cocaine as wel. He was also associated with Cobb, both directly and indirectly. Indirectly, Heslip worked for Cobb. This is evidenced by the fact that Heslip was driving a car from which Misher sold three ounces of cocaine and was fully aware of this transaction. Directly, his

relationship went beyond drug trafficking. Heslip was Cobb's half-brother.

II. Discussion

A. Sufficiency of the evidence

1. Standard of review

A conviction must be allowed to stand if, after viewing the evidence in the light most favorable to the prosecution, the reviewing court finds that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S> 307, 309; 99 S.Ct. 278 (1979).

2. Rodney Earl Heslip

Heslip challenges the sufficiency of the evidence to support his conviction on Count One: Conspiracy to possess and distribute cocaine and distributing cocaine.

In order to sustain appellant's convictions for a drug conspiracy, the evidence must establish beyond a reasonable doubt that: (1) there existed an agreement between two or more persons to violate narcotics laws; (2) the appellant had knowledge of the agreement; and (3) he voluntarily participated in it. *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir. 1996). Merely placing a defendant in a "climate of activity that reeks of something foul" is not enough to support a conspiracy conviction. *United States v. Dean*, 59

F.3d 1479, 1485 (5th Cir. 1995) (*quoting United States v. Galvan*, 695 F.2d 417, 419 (5th Cir. 1982). Nevertheless, a jury may infer each element of a conspiracy from circumstantial evidence: "an agreement to violate narcotics laws may be inferred from concert of action." *United States v. Cardenas*, 9 F.3d 1139, 1157 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2150 (1994). In fact, a defendant need only have a minor role in the conspiracy once it is shown that he voluntarily agreed to participate. *United States v. Castillo*, 77 F.3d 1480, 1493 (5th Cir. 1996), *cert. denied*, ___ S.Ct. ___, 1996 WL 442629. His presence and association with other members of a conspiracy, when supported by other evidence, may be used to support the finding of a conspiracy. *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir.), *cert. denied*, 115 S.Ct. 240 (1994); *Cardenas*, 9 F.3d at 1157.

As mentioned above, the government showed that Heslip sold cocaine. (13 R. 907). Two individuals, Luis Sais and Clemond Busby, testified that the purchased drugs from Heslip. More specifically, Busby testified that he pruchased "six or seven rocks" from Heslip. (11 R. 533-534). Sais also bought crack cocaine from Heslip (12 R. 726). Furthermore, Heslip was driving his car from which he knew Misher was selling cocaine. (13 R. 906-907). In searching Heslip's car, the phone number to a pager owned by Cobb was found by

the police. (10 R. 153; 14 R. 1329). Several receipts and documents belonging to Cobb were also found in Heslip's possession. (11 R. 236-249). During the execution of a search warrant at Heslip's residence, the police found and seized a .22 caliber Marlin rifle (11 R. 263), cocaine-cutting paraphernalia (11 R. 264), a shotgun (11 R. 266), and other traditional crack-manufacturing supplies (11 R. 266-267).

As Cobb is Heslip's half-brother, the probative value of this evidence concerned us at first glance. However, after reviewing the record, reading the briefs, and listening to appellant's argument, we find that the jury was presented with more than sufficient evidence so that a rational trier of fact could have found the essential elements of his conviction beyond a reasonable doubt.

2. Misher, Levi, and Cobb - Conspiracy

The remaining three appellants also contend that the evidence presented at trial was insufficient to uphold their conspiracy convictions. However, the record is replete with evidence as to Misher, Levi, and Cobb's conspiracy and distribution convictions. Given the standard of review as dictated above, the case law behind conspiracy to possess and distribute and distributing cocaine, and a thorough review of the record, appellant's arguments and briefs, we must uphold

the lower court's conspiracy convictions of these three defendants as charged.

3. Levi and Cobb - Money Laundering

To obtain a conviction for money laundering, the government must show that a defendant: (1) knowingly conducted a financial transaction, (2) that involved the proceeds of an unlawful activity; (3) knowing that the transaction was in whole or in part to conceal the nature, the location, the source, the ownership, or the control of the proceeds of an unlawful activity. 18 U.S.C. 1956 (a)(1)(B)(1).

The grand jury indicted Cobb for purchasing a 1984 Jaguar in violation of 18 U.S.C. 1956. In support ofthis indictment the government presented evidence to show that Cobb had purchased the automobile for $14,500 in cash. (13 R. 1181). In fact, Cobb came in to the dealership carrying the money in a small suit case. (13 R. 1181). The money which he purchased the car with consisted mainly of small bills, including ones, fives, tens, and twenties. (13 R. 1182). Furthermore, the name put on the car's title was fictitious. (13 R. 11831186). Although the government did not show that the money came from drug trafficking it did present evidence as to Cobb's dealings in narcotics. It also

introduced evidence that all of these practices are common methods of operation for drug dealers. (10 R. 52-54). From this, a reasonable juror could conclude that the car was bought with proceeds from drug sales and the care was paid for in cash to conceal the source of those funds.

Levi was also convicted of laundering money by purchasing a 1964 Chevrolet pick-up truck with proceeds from drug sales. He also purchased this truck with bills of small denominations, tens and twenties. (11 R. 378-379). Levi contends that Hicks was the only witness who presented evidence that Levi had bought the Chevy pick-up, and that all other evidence indicated that the car was actually purchased by Hicks. (11 R. 377-379). Nevertheless, it is the jury's job to assess the credibility of the witnesses. *United States v. Polk,* 56 F.3d 613, 620 (5th Cir. 1995). Moreover, the truck was found in Levi's garage during a search of his residence. We find that a reasonable juror could find that Hicks' testimony and the location of the truck were sufficient evidence to determine that the struck belonged to Levi. Similarly, the same jurors could find that this purchase came from drug proceeds and it was paid for in cash in order to conceal the source of those funds.

B. Procedure and Evidence

1. Misher - Combining drug conspiracy count with money laundering count.

Misher, who was only indicted under count one, conspiracy to distribute cocaine, contends that he was prejudiced by the district court's failure to sever the drug conspiracy count from the two money laundering counts. Because Misher did not move for severance or object at trial to the joinder of the defendants, this court must apply the plain error standard. *United States v. Carreon,* 11 F.3d 1225, 1240 (5th Cir. 1994). Under plain error review, the petitioner must show that: (1) error occurred; (2) the error was clear or obvious; and (3) the error affected the petitioner's substantial rights. *United States v. Upton,* 91 F.3d 677, 686 (5th Cir. 1996); *United States v. Calverley,* 37 F.3d 160, 162, 164 (5th Cir. 1994) (en banc) (citing *United States v. Olano,* 507 U.S. 725, 730-37 (1993), *cert. denied,* 115 S.Ct. 1266 (1995). We have noted that the Supreme Court has added what amounts to be a fourth factor: a reviewing court "need not exercise its discretion to correct the serror unless it seriously affects the fariness, integrity, or public reputation of judicial proceedings." *Upton,* 91 F.3d at 686, *Jobe,* 77 F.3d at 1476.

Misher claims that because much of the evidence introduced would not have been admissible against him in a separate trial, he has been deprived of a fair trial.

Nevertheless, the district court gave proper jury instructions, clearly noting that each count was to be considered separately, that the case of each defendant should be considered individually, and that the verdict of one defendant does not affect the guilt of the others. (16 R. 1934). In conspiracy cases, the general rule is that persons indicted together should be tried together. A defendant can only obtain a reversal for failure to sever if he can demonstrate "compelling prejudice against hwich the trial court was unable to afford protection." *United States v. Fields*, 72 F.3d 1200, 1215 (5th Cir.) (quoting *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir.), *cert. denied*, 510 U.S. 898 (1993), *cert. denied*, ___ S.Ct. ___, 1996 WL 183444 (1996). Here, the cautionary instructions were sufficient to protect the appellant from prejudice.

Misher also notes that while the verdict form did have a separate guilty or not guilty answer blank for each of the substantive counts, it did not contain a separate answer blank concerning whether the conspiracy charge was proved. (2 R. 330). While a separate blank for the conspiracy charge may have been of some value, it is not mandated. *United States v. Sherrod*, 964 F.2d 1501, 1514 & n.30 (5th Cir. 1992) (noting that a verdict form that had an answer blank as to whether the conspiracy charged was proved beyond a reasonable doubt to

have existed helped to clarify jury's role), *cert. denied*, 507 U.S> 975 (1993). Therefore, the district court did not commit plain error by joining the drug conspiracy count with the money laundering count.

2. Cobb and Heslip - refusal to introduce affidavit and permit cross examination

During the trial, defense counsel for Cobb attempted to introduce an affidavit that was submitted in support of the search warrants used in this case. The lower court sustained the prosecution's objection to the relevancy of the affidavit.

Heslip's attorney attempted to cross-examine the affiant, Detective Moore, about statements made in the affidavit. The court sustained the prosecution's objection to the relevancy of the testimony. Heslip's defense counsel wished to introduce evidence that Moore listed the persons he believed to be part of the conspiracy in the affidavit, but failed to include Heslip.

Cobb and Heslip contend that the affidavit should have been admitted as a prior inconsistent statement, under Federal Rule of Evidence 613(b). The government contends that the district court did not abuse its discretion, because Moore's opinion regarding the member of the conspiracy, as evidenced in the search warrant, has little relevance to his opinion regarding the members of the conspiracy at the trial that

occurred one and one-half years after the affidavit was prepared.

As contemporaneous objections were made to these rulings, we will reverse only if the district court abused its discretion. *United States v. Martinez*, 962 F.2d 1161, 1164 (5th Cir. 1992). The district court acted within its discretion in concluding that Moore's testimony was consistent with his affidavit, and, therefore, the affidavit would not serve to impeach his testimony. Moore had one and one-half years to change his opinion regarding the scope of the conspiracy. There is no evidence that anything contained in the affidavit directly contradicted Moore's testimony. Therefore, the district court's ruling is not grounds for reversal.

3. Cobb and Levi- Admission of testimony regarding prior bad acts.

The trial court allowed Eric Anzaldua to testify that he had sold significant quantities of marijuana to Cobb and Levi. Defense counsel failed to object to the testimony. Therefore, the district court's ruling is only reviewed for plain error.

We apply a two-pronged test to determine the admissibility of evidence under Fed. R. Evid. 404(B). First, the evidence must be relevant to an issue other than the defendant's character. Second, the evidence must have probative value that is not substantially outweighed by undue

prejudice. See *United States v. Beechum*, 582 F.2d 898, 911 (1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

Evidence of other crimes is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). A defendant places his intent in issue when he has pled not guilty in a drug conspiracy case, and, therefore, evidence of past drug transactions can be used to establish criminal intent. *United States v. Wilwright*, 56 F.3d 586, 589 (5th Cir.) (noting that "it is settled in this Circuit that Rule 404(b) permits the admission of other crime evidence when a defendant places his intent at issue in a drug conspiracy case by pleading not guilty"), *cert. denied*, 116 S.Ct. 345 (1995).

Step two of the test requires that the testimony not be unduly prejudicial. We have held that under the Rules of Evidence, there is a strong presumption that probative evidence should be admitted. *United States v. Leahy*, 82 F.3d 624, 637 (5th Cir. 1996) (noting that "while some danger of prejudice is always present, exclusion of extrinsic evidence based on its prejudicial effect 'should occur only sparingly.'") (quoting *United States v. pace*, 10 F.3d 1106, 1115 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2180 (1994). Given that the district court's ruling is only reviewed for plain error, the appellants face a difficult burden. We have held that

admission of similar evidence was not erroneous even under the abuse of discretion standard. *Wilwright*, 56 F.3d 586 (holding that evidence of defendant's participation in prior drug sales was not unduly prejudicial); *United States v. Bermea*, 30 F.3d 1539, 1562 (5th Cir. 1994), *cert. denied*, 115 U.S. 1113 (1995) (noting that the Fifth Circuit has "frequently held in drug offense cases that evidence of a defendant's extrinsic drug offenses is admissible"). Therefore, admission of the evidence was not reversible error.

C. Sentence

1. Standard of review

We review the district court's application of sentencing guidelines de novo, and review the district court's factual findings for clear error, giving deference to the district court's application of the guidelines to the facts. *United States v. West*, 58 F.3d 133, 137 (5th Cir. 1995).

2. Cobb

Cobb's main argument centers around the allegation that the district court erred in its calculation of the amount of crack cocaine to be used in determining Cobb's sentence because it miscounted the quantity of drugs involved in various drug transactions.

The presentencing report attributed 1.325 kilograms of crack cocaine to Cobb. 510.3 grams of this total weight

were included based on testimony given by Kenneth Cross. Cross testified that he had sold Cobb 18 ounces of powder cocaine and that Cobb converted one or two ounces of the powder cocaine to crack cocaine in an effort to test and see if the powder cocaine produced a sufficient amount of crack cocaine when converted. (12 R. 796-797). While there is evidence from which the court could conclude that Cobb eventually converted all of the powder to crack cocaine, there is no evidence that the conversion would produce eighteen ounces of crack. However, even if Cobb's contentions are correct and the 510.3 grams of crack were eliminated from the quantity which the district court calculated his sentence, his offense level would be unchanged. Thus, although the error was clear, it was harmless.

3. Misher, Levi, Heslip, and Cobb

All of the appellants challenge the calculation of their sentences for various reasons. However, after reviewing the record in accordance with the standard of review, the sentencing guidelines, each party" briefs and arguments, we find that all the sentences should stand. The only argument which merited discussion was the above argument posed by Cobb.

III. Conclusions

Based on the foregoing, we AFFIRM the convictions and sentences of all Appellants.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

USA
Plaintiff,

Case No. W-93-CR-096(2)

v.

KEITH O. COBB,
Defendant.

USAO Number 9304379

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, KEITH O. COBB, was represented by WALTER M. REAVES, JR.

On Motion of the United States, the Court has dismissed Counts S1 and S2.

The defendant was found guilty on Counts SS1 and SS2 by a jury verdict on December 22, 1994, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title 21, Section 846 and Title 21, Section 841(a)(1), the nature of which offense is conspiracy to possess with the intent to distribute and to distribute cocaine, which offense is dated September 30, 1993, under count SS1;

Title 18, Section 371, the nature of which offense is conspiracy to violate Title 18, Section 1956 (a)(1)(B)(i),

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money laundering, which offense is dated March 22, 1989, under count 2, SS2.

As pronounced on April 7, 1995, the defendant is sentenced as provided in Pages 2- 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 for Counts SS1 and SS2, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 10th day of April, 1995.

Signed Walter S. Smith, Jr., United States District Judge.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FOUR HUNDRED (400) MONTHS as to Count SS1 and SIXTY (60) MONTHS as to Count SS2, such terms of imprisonment to be served CONCURRENTLY with each other.

The defendant shall remain in custody pending service of sentence.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS as to Count SS1 and THREE (3) YEARS as to Count SS2, such terms of supervised release to be served CONCURRENTLY with each other.

While on supervised release, the defendant shall not commit another Federal, State, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons;

The defendant shall pay any fine and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release. Any balance at the commencement of the term of supervised release shall be paid on a schedule to be approved by the Court;

The defendant shall not own or possess a firearm or destructive device;

The defendant shall provide the probation officer with access to any requested financial information;

The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer.
2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons.
6. The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency with the permission of the Court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
14. The defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape or form, without the express authority of the Court.

FINE

The defendant shall pay a fine of $10,000. This fine includes any costs of incarceration and supervision.

This amount is the total of the fines imposed on individual counts, as follows: $5,000 as to each of Counts SS1 and SS2.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid immediately. Any balance at the commencement of the term of supervised release shall be paid on a schedule to be approved by the Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

USA,

Appellee NO. 95-50248

V.

RODNEY HELSIP,

Defendant-Appellant

ON PETITION FOR REHEARING

BEFORE REYNALDO G. GARZA, JOLLY, AND DEMOSS, CIRCUIT JUDGES

per curiam.

It is ordered that the petition for re-hearing filed in the above case is denied.

Entered for the court:

Reynald G. Garza

United States Circuit Judge

Signed and Filed December 16, 1996

APPENDIX C

October 8, 1996

The Honorable E. Grady Jolly,
Emilio M. Garza, and
Harold R. DeMoss, Jr.
Circuit Judges
U.S. Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

RE: United States v. Anthony Misher, et al.
No. 95-50248

Dear Judges Jolly, Garza, and DeMoss:

At oral argument in New Orleans on October 1, 1996, Judge Jolly expressed concern regarding the district court's conversion of 18 ounces of powder cocaine into crack cocaine for purposes of calculating Appellant Cobb's base level. As set forth below, any error in the district court's drug quantity calculation did not effect Cobb's sentence.

A review of Cobb's PSI set forth a total powder cocaine quantity of 25.81 kilograms and total crack cocaine quantity of 1.325 kilograms (Cobb PSI para. 177). Pursuant to USSG Section 2D1.1, the crack cocaine transposed into 5,162 kilograms of marijuana and the crack cocaine transposed into 26,500 kilograms of marijuana resulting in a total of 31,662 kilograms of marijuana.

At sentencing, the district court reduced this amount by 680.4 grams of powder cocaine and 453.6 grams of crack cocaine to eliminate any risk of double counting (8 R. 85; Cobb PSI para. 173(w) & (x). This reduced the total marijuana from 31,662 to 22,563 kilograms. Based upon

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these reductions, the district court determined that Cobb's base offense level was 36 (two levels lower than originally recommended in Cobb's PSI). The district court then added a four-level leadership adjustment resulting in an adjusted base offense level of 40 (8 R. 85-86). Cobb's criminal history category was II, resulting in a Guideline range of 324 - 405 months of imprisonment. (id.). The district court sentenced Cobb to 400 months (8 R. 86).

USSG Section 2D1.(c)(2) provides a base offense level of 36 where drug quantity is at least 10,000 but less than 30,000 kilograms of marijuana. Section 2D1.1's Drug Equivalency Tables provide that each gram of crack cocaine is equal to 20 kilograms of marijuana. The 18 ounces (510 grams) of crack at issue here would convert to 18 ounces of crack cocaine from the drug quantity calculation, the remaining total marijuana amount is at least 12,263 kilograms, well within the base offense level 36.

In summary, Appellant Cobb's base offense level was not effected by the district court's conversion of the 18 ounces of powder cocaine into crack cocaine. Any error in the district court's drug quantity calculation was harmless.

Very truly yours,

JOSEPH GAY, JR.
Assistant U.S. Attorney

cc: All counsel